UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 5

EMSA CORRECTIONAL CARE

Employer

and Case 5-RC-14802

TEAMSTERS LOCAL UNION 430, A/W INTERNATIONAL
BROTHERHOOD OF TEAMSTERS, AFL-CIO

Petitioner

ORDER AMENDING DECISION AND DIRECTION OF ELECTION

The above-cited Decision and Direction of Election is hereby amended, please substitute this Decision and Direction of Election for that which issued on April 1, 1999. The correction reflects a corrected Unit.

Dated at Baltimore, Maryland, this 6th day of April 1999.

/s/ LOUIS J. D'AMICO
Louis J. D'Amico, Regional Director
National Labor Relations Board, Region 5
103 S. Gay Street, 8th Floor
Baltimore, MD 21202-4061

FORM NLRB-4477
(7-95)

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EMSA CORRECTIONAL CARE[1/]

Employer

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Petitioner

Case 5-RC-14802

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9*(c)* of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National Labor Relations Board; hereinafter referred to as the Board.

Pursuant to the provisions of Section 3*(b)* of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding, the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein. [2/]

3. The Petitioner involved claims to represent certain employees of the Employer. [3/]

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9*(c)(1)* and Section 2*(6)* and *(7)* of the Act.

5. The following employees of the Employer constitute appropriate voting groups.[4/]

(a) All registered nurses (RNs) employed by the Employer at its York, Pennsylvania facility, but excluding all other employees, office clericals, guards and supervisors as defined in the Act.

(b) All licensed practical nurses (LPNs), certified medical assistants (CMAs), dental assistants, and medical records personnel employed by the Employer at its York, Pennsylvania facility, but excluding all other employees, registered nurses, office clericals, guards and supervisors as defined in the Act.

DIRECTION OF ELECTION

An Election by secret ballot shall be conducted by the undersigned among the employees in the voting groups found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the voting groups who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that commenced less than 12 months before the election date and who retained their status

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as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective-bargaining purposes by

TEAMSTERS LOCAL UNION 430, A/W
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

LIST OF VOTERS

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Co.,* 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the *full* names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility,* 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. The request must be received by the Board in Washington by **April 20, 1999**.

Dated ___April 6, 1999____

at __Baltimore, Maryland____ ___/s/ LOUIS J. D'AMICO_____
Regional Director, Region 5

1/ At the hearing, the Employer amended the petition and formal papers to reflect the correct name of the Employer as EMSA Correctional Care.

2/ The parties stipulated and I find that: EMSA Correctional Care (hereinafter the Employer) is a Florida corporation with an office and place of business in York, Pennsylvania; the Employer is engaged in the business of providing medical and health care services to inmates at the York County, Pennsylvania prison; during the last 12 months, a representative period, the Employer, in conducting its business operations described above, derived gross revenues in excess of $250,000; during the same period, the Employer, in the course and conduct of its business operations described above, purchased and received in its Pennsylvania facilities goods valued in excess of $5,000, which originated outside the State of Pennsylvania.

3/ The parties stipulated and I find that the Teamsters Local Union 430, affiliated with the International Brotherhood of Teamsters (hereinafter the Union or Petitioner), is a labor organization within the meaning of Section 2(5) of the National Labor Relations Act as amended (hereinafter the Act).

4/ At the hearing, the Petitioner amended the Petition and is seeking to represent employees in the following unit, which includes 29 employees:

> All registered nurses (RNs), licensed practical nurses (LPNs), certified medical assistants (CMAs), dental assistants, and medical records personnel employed by the Employer at its York, Pennsylvania facility, but excluding all other employees, office clericals, guards and supervisors as defined by the Act.

At the outset of the hearing, the Employer sought to specifically exclude certified medical assistants from the proposed unit on the basis that CMAs were confidential employees. The parties later stipulated that CMA's were not confidential employees.

DISPUTED ISSUE

Whether Section 9(b)(3) of the Act, Pennsylvania Law, or the Board's conflict of interest "doctrine" bar certification of the petitioned-for Unit on the grounds that Petitioner also represents a unit of correctional officers employed by York County, Pennsylvania, at the same correctional facility.

POSITIONS OF THE PARTIES

PETITIONER

The Petitioner contends that correctional officers are not employees as defined by the Act or guards within the meaning of the Act. Accordingly, Petitioner asserts, Section 9(b)(3) of the Act is not applicable to the present case, and thus, does not bar certification of the petitioned-for Unit.

EMPLOYER

The Employer contends that Section 9(b)(3) of the Act bars certification of the petitioned-for Unit because the correctional officers already represented by the Union at the York County Prison are "guards" within the meaning of the Act; that certification of the petitioned-for Unit would create an impermissible conflict of interest for the correctional officers; and that certification of the petitioned-for Unit would violate Pennsylvania Law.

BACKGROUND

The Employer is in the business of providing health care services to correctional facilities throughout the Eastern United States. York County, Pennsylvania contracted the Employer to provide health care services at the York County Prison (hereinafter the Prison) beginning October 1, 1995. Prior to that date, York County employed its own medical staff at the Prison. When the Employer took over the medical services at the Prison, it hired most of the medical staff formerly employed by the County. These employees have never been represented by a union while they worked in the Prison.

The correctional officers working at the Prison are employed by York County. They have been represented by the Union for the purpose of collective bargaining since October 30, 1975. The correctional officers' unit was certified by the Pennsylvania Labor Relations Board. Although not officially in the correctional officers' unit, the kitchen staff, also County employees, have been treated by York County and the Union as members of that bargaining unit. The Union also represents a group of maintenance employees at the Prison in a separate unit that was voluntarily recognized by York County.

The parties stipulated that York County is a political subdivision of the Commonwealth of Pennsylvania. The parties, thus, do not dispute that correctional officers, all of whom are employees of York County, are public employees.

CERTIFIABILITY OF PETITIONED-FOR UNIT

APPLICABILITY OF SECTION 9(b)(3) OF THE ACT

The Employer contends that the correctional officers already represented by Petitioner at the Prison are "guards" within the meaning of the Act and, thus, Section 9(b)(3) bars certification of the petitioned-for Unit of non-guard employees.

Section 9(b) states in pertinent part:

> (b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit or subdivision thereof: *Provided,* That the Board shall not . . . (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to

> enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership or is affiliated directly or indirectly with an organization which admits to membership employees other than guards. (emphasis added).

As noted above, however, the correctional officers employed at the York County Prison are public employees. The Board has long held that public employees are neither "employees" nor "guards" within the meaning of the Act. Dynair Services, Inc., 314 NLRB 161, 161-62 & n.3 (1994) (holding that public employees are not "guards" within the meaning of the Act as a matter of law); Children Hospital of Michigan, 299 NLRB 430 (1990) (holding that public employees are not "employees" within the meaning of Sections 2(2) and 9(b)(3) of the Act); Ojai Valley Community Hospital, 254 NLRB 1354, 1356 (1981) (holding that public employees are not "guards" within the meaning of Section 9(b)(3) of the Act). Accordingly, Section 9(b)(3) has no application to the instant case. In its brief, the Employer attempts to distinguish Dynair Services from the present case arguing that the duties of "correctional officers" are more analogous to the duties of "guards" than the duties of "access controllers" were in Dynair Services. As the Board noted in Dynair Services, however:

> Because Ojai Valley held as a matter of law that public employees are not guards within the meaning of the NLRA, the Employer's attempt to distinguish Ojai Valley on factual grounds is wholly without merit.

Dynair Services, 314 NLRB at 162 n.3. The Employer's argument here that "correctional officers" are more "guards" than "access controllers" were in Dynair Services is, therefore, equally without merit.

I thus find that the correctional officers employed at the York County Prison are not "guards" within the meaning of the Act as a matter of law, and thus, Section 9(b)(3) does not bar certification of the petitioned-for Unit.

CONFLICT OF INTEREST

The Employer next contends that certification of the petitioned-for Unit would create an impermissible conflict of interest for the correctional officers who would be called upon by York County to enforce the Prison's rules of conduct on their fellow Union members, the employees of the Employer. The Employer appears to suggest in its brief that the Board has adopted a broad conflict of interest "doctrine" by which labor organizations can be precluded from representing employees if such representation would create some generalized conflict of interest on any party. The Employer cites as authority for this proposition the Board decisions in Sierra Vista Hospital, 241 NLRB 631 (1979) and Bausch & Lomb Optical Co., 108 NLRB 1555 (1954). As discussed more fully below, these cases do not stand for the proposition advanced by the Employer. I thus find that "conflict of interest" does not bar certification of the petitioned-for Unit.

At the outset, I note that the conflict of interest alleged to exist in this case is on the correctional officers. The correctional officers, however, are not employed by the Employer, but rather by York County. Thomas Hogan, Warden of the York County Prison, was present during the hearing and did not seek to intervene on behalf of York County. Hogan, however, was called to

testify by the Employer during the hearing and was asked if he was concerned about the Employer's employees becoming unionized. Hogan answered that his "only" concern was that he might not be able to provide medical services to the inmates if the Employer's employees went out on strike. Hogan candidly admitted, however, that if the Employer's employees went out on strike he would demand that the Employer provide the coverage needed and that "[h]ow they got that would be [the Employer's] particular problem."

In Sierra Vista and Bausch & Lomb the Board addressed the issue of whether an employer was obligated to bargain with a union that was either a competitor of the employer, or had in its membership supervisors of the employer or of competing businesses. The Board in Sierra Vista viewed "conflict of interest" as

> concerned with two different forms of conflict – one involving the conflict between an employer's interest in the loyalty of its own supervisors and that of employees in a single-minded representative, the other involving a conflict between that employee interest and an interest a union may have outside its representative responsibilities.

Sierra Vista, 241 NLRB at 634. None of these conflicts are alleged to be present in the instant case. And there is certainly none that would justify the Employer to refuse to bargain with the petitioned-for Unit. Accordingly, I find that conflict of interest does not bar certification of the petitioned-for Unit.

APPLICABILITY OF PENNSYLVANIA LAW

The Employer finally contends that certification of the petitioned-for Unit by the NLRB would violate Pennsylvania's Public Employees Relations Act. Specifically, the Employer points to Article 43 Section 1101.604(3) of the Pennsylvania Statutes, which states in pertinent part:

> In determining the appropriateness of the unit, the [Pennsylvania] board shall:
> . . . .
> (3) Not permit guards at prisons and mental hospitals, employees directly involved with and necessary to the functioning of the courts of this Commonwealth, or any individual employed as a guard to enforce against employees and other persons, rules to protect property of the employer or to protect the safety of persons on the employer's premises to be included in any unit with other public employees, each may form separate homogenous employee organizations with the proviso that organizations of the latter designated employee group may not be affiliated with any other organization representing or including as members, persons outside of the organization's classification. (emphasis added).

Contrary to the Employer's contention, the Pennsylvania statute quoted above only speaks of "public employees." Public employees, however, are not the subject of the present Petition. The Pennsylvania statute, therefore, has no application to the present case. Even assuming that it did, however, the Employer's argument fails for a more basic reason.

Article VI of the Constitution of the United States declares in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Section 7 of the Act gives employees, as that term is defined in the Act, the right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." None of the parties here dispute that the employees of the Employer in the petitioned-for Unit are "employees" within the meaning of the Act. Section 7 of the Act, therefore, affirmatively vests upon them the aforementioned rights, anything in the Constitution or laws of Pennsylvania to the contrary notwithstanding. See, e.g., Hill v. Florida, 325 U.S. 538 (1945) (striking a Florida statute that interfered with "the command of s 7 of the National Labor Relations Act that 'employees shall have the right . . . to bargain collectively through representatives of their own choosing'") (Stone, C.J. concurring). Thus, the Pennsylvania statute cannot bar certification of the petitioned-for Unit.

UNIT

The Board has traditionally held that Registered Nurses are professional employees. Mercy Hospitals of Sacramento, 217 NLRB 765 (1975); Centralia Convalescent Center, 295 NLRB 42 (1989). Under the proscription of Section 9(b)(1) of the Act, professional employees cannot be included in a nonprofessional unit without their consent. The Registered Nurses, as professional employees, are entitled to vote on two questions: (1) whether they desire to be included in a group composed of non-professional employees, and (2) their choice with respect to a bargaining representative. Sonotone Corp., 90 NLRB 1236, 1241-42 (1950). If the majority of professionals vote "yes" on inclusion, their votes are counted with the nonprofessionals; if the majority vote "no," their votes are counted separately to determine whether they want the Petitioner to represent them in a separate unit.

Accordingly, I am directing elections in the following separate voting groups, one consisting of all registered nurses (RNs) and the other consisting of all licensed practical nurses (LPNs), certified medical assistants (CMAs), dental assistants and medical records personnel employed by the Employer at its York, Pennsylvania facility:

> (a) All registered nurses (RNs) employed by the Employer at its York, Pennsylvania facility, but excluding all other employees, office clericals, guards and supervisors as defined in the Act.

> (b) All licensed practical nurses (LPNs), certified medical assistants (CMAs), dental assistants, and medical records personnel employed by the Employer at its York, Pennsylvania facility, but excluding all other employees, registered nurses, office clericals, guards and supervisors as defined in the Act.

Employees in voting group (a) shall be asked two questions on the ballot:

(1) Do you desire to be included in a unit with non-professional employees?

(2) Do you desire to be represented for purposes of collective bargaining by the Teamsters Local Union 430, a/w International Brotherhood of Teamsters?

If a majority of the employees in voting group (a) vote "yes" to the first question, indicating a choice to be included in a unit with non-professional employees, the group will be so included. Voting group (a)'s vote on the second question will then be counted with the votes of the non-professional voting group (b) to decide the representative for the entire unit. If, on the other hand, a majority of the professional employees in voting group (a) do not vote for inclusion, these employees will not be included with the non-professional employees, and their votes on the second question will be separately counted to decide whether they want to be represented in a separate professional unit.

I make the following findings with regard to the appropriate unit:

1. If a majority of the professional employees vote for inclusion in a unit with non-professional employees, I find the following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(a) of the Act:

> All registered nurses (RNs), licensed practical nurses (LPNs), certified medical assistants (CMAs), dental assistants, and medical records personnel employed by the Employer at its York, Pennsylvania facility, but excluding all other employees, office clericals, guards and supervisors as defined in the Act.

2. If a majority of the professional employees do not vote for inclusion in the unit with non-professional employees, I find that the separate voting groups set forth above constitute units appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.